

**SANITIZED DEC. 04-690 C – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION 4/27/05 – ISSUED 6/16/05**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF MET IN PART – Although Petitioners did not appear in person, information contained in their petition for reassessment, when verified, proved that actual income figures should supplant the estimated tax figures used by the tax auditor in conducting the audit for tax year 2003.

FINAL DECISION

On August 15, 2004, the Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued an estimated consumers' sales and service tax assessment against the Petitioners. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the periods ended December, 2001 and December, 2003, for tax, interest, and additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioners.

Thereafter, by mail postmarked October 17, 2004, the Petitioners timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioners.

There was no appearance on behalf of the Petitioners when the hearing was convened. The hearing was held, however, without an appearance on behalf of the Petitioners, *see* W. Va. Code § 11-10A-10(a) [2002] and 121 C.S.R. 1, § 69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. In their petition for reassessment, Petitioners stated that they conducted no business whatsoever during the year 2001 and did first conduct business in the year 2003.
2. Prior to the time of the hearing, Petitioners submitted to Respondent's counsel the actual balance sheet for verification, reflecting the actual taxable receipts for 2003 amounting to tax, plus interest and additions to tax.
3. Because a showing was made by Petitioners that they conducted no business in tax year 2001, said year will be deleted from the assessment.
4. It is undisputed that during tax year 2003, Petitioners collected consumers' sales and service tax but failed to remit same.

DISCUSSION

The only issue is whether the Petitioners have shown that the assessment is incorrect and contrary to law, in whole or in part.

In this case, Petitioners have shown that for the only year still in question, their actual taxable receipts should be used in lieu of the estimated tax figures utilized by the tax auditor.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for

reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioners-taxpayers in this matter have carried the burden of proof with respect to their contention that actual tax figures should supplant the estimated tax figures used by the tax auditor for tax year 2003. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioners for the periods ended December, 2001 and December, 2003 should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax, interest, on the revised tax, through June 20, 2005, and additions to tax, for a **total revised** liability.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this modified consumers' sales and service tax assessment until this liability is fully paid.